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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

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DAVID F. SCOLIO,)
Plaintiff,) No. CV-10-301-CI

5

v.) ORDER DENYING DEFENDANT'S
MOTION TO AMEND OR ALTER
JUDGMENT

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MICHAEL J. ASTRUE,)
Commissioner of Social)
Security,)

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Defendant.)

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Pursuant to FED. R. CIV. P. 59(e), Defendant Michael Astrue, Commissioner of Social Security ("Defendant") moved to alter or amend this court's judgment reversing the Commissioner's denial of disability benefits to Plaintiff and remanding for payment of benefits. Under Rule 59(e), a motion to alter or amend judgment may be granted where "necessary to correct manifest errors of law or fact upon which the judgment is based." *Turner v. Burlington Northern Santa Fe Railroad*, 338 F.3d 1058, 1063 (9th Cir. 2003) (citations omitted). The Defendant contends that reconsideration is necessary to correct the court's manifest error in determining that the Plaintiff's severe impairment (mental retardation) satisfied the requirements of 20 C.F.R., Pt. 404, Subpt. P, App. 1, § 12.05C. The Defendant asserts that the court erred by "incorrectly accept[ing] the IQ scores without addressing the ALJ's treatment of the medical evidence and corresponding inference that Plaintiff's IQ scores were not valid." (ECF No. 21 at 3.) Plaintiff disagrees. (ECF No. 26.) This court concludes it did not err in finding Plaintiff's IQ scores met the Listing and by awarding benefits to Plaintiff.

1 **A. ASSESSMENT OF THE LISTING CRITERIA**

2 Defendant argues that the court committed a manifest error of
3 fact and law by relying upon IQ scores that were rejected by the
4 ALJ. The Defendant contends that the ALJ's reason for rejecting the
5 medical evidence creates a "corresponding inference" that the tests
6 administered by the physicians were invalid. Defendant also argues
7 that even if the IQ scores were valid, Plaintiff does not meet
8 listing 12.05C because he lacks a second impairment.

9 **1. IQ Scores**

10 Defendant argues that the court relied upon IQ scores that were
11 rejected by the ALJ. Defendant contends that the ALJ reasonably
12 interpreted James E. Bailey, Ph.D.'s opinion as rejecting
13 Plaintiff's IQ scores. (ECF No. 21 at 4.) Defendant acknowledges
14 "neither the ALJ nor Dr. Bailey explicitly addressed this issue."
15 (ECF No. 21 at 4.) The Defendant argues that "Dr. Bailey's opinion,
16 which the ALJ accepted, concluded that Plaintiff's IQ scores were
17 not below 71 because he diagnosed borderline intellectual
18 functioning rather than mild mental retardation." (ECF No. 21 at 4-
19 5.)

20 The ALJ gave "significant weight" to the opinion of James E.
21 Bailey, Ph.D., who administered several tests to Plaintiff,
22 including the Full Scale IQ, which indicated Plaintiff's IQ was 64.
23 (Tr. 25; 196-99.) Dr. Bailey, a consultative examiner, saw
24 Plaintiff on September 30, 2008, and administered several tests.
25 (Tr. 196.) On the WAIS-IV, Plaintiff's verbal comprehension score
26 was in the mildly mentally retarded range and his perceptual
27 reasoning was in the borderline range. (Tr. 24.) Plaintiff's Full
28 Scale IQ score was 64. (Tr. 198.) Dr. Bailey noted that a Full

1 Scale IQ score of 64 was technically in the mentally retarded range,
2 and without elaboration, he concluded that Plaintiff's "history is
3 more consistent with borderline IQ."¹ (Tr. 198.)

4 As Defendant acknowledged, neither Dr. Bailey nor the ALJ's
5 opinion explicitly rejected Plaintiff's IQ scores. Dr. Bailey
6 simply asserted Plaintiff's "history is more consistent with a
7 borderline IQ." (Tr. 198.) (Emphasis added.) The ALJ repeated Dr.
8 Bailey's assertion, and indicated she gave "great weight" to the
9 opinion. (Tr. 24-25.) These conclusory statements fail to support
10 Defendant's argument. See *Connett v. Barnhart*, 340 F.3d 871, 874
11 (9th Cir. 2003) (error for district court to affirm ALJ's
12 credibility decision "based on evidence [ALJ] did not discuss" and
13 "specific facts or reasons" ALJ did not assert); see also *Bray v.*
14 *Comm'r of Social Security Admin.*, 554 F.3d 1219, 1225-26 (9th Cir.
15 2009) ("[l]ong-standing principles of administrative law require us
16 to review the ALJ's decision based on the reasoning and factual
17 findings offered by the ALJ—not post hoc rationalizations that
18 attempt to intuit what the adjudicator may have been thinking.").
19 With an IQ score of 64, Plaintiff has demonstrated the requisite IQ
20 score to qualify as "significantly subaverage general intellectual
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22 ¹Borderline intellectual functioning" describes an IQ ranging
23 between 71 and 84. American Psychiatric Assn, *Diagnostic and*
24 *Statistical Manual*, Fourth Ed., Text Rev. (2000), p. 740. A
25 borderline IQ range is outside the range prescribed by Listing §
26 12.05. To meet Listing § 12.05, including § 12.05C, plaintiff must
27 show an IQ score below 71. 20 C.F.R. Pt. 404, Supt. P, App. 1, §
28 12.05.

1 functioning" for purposes of Listing § 12.05C.²

2 Next, Defendant argues that the ALJ rejected the test scores
 3 adopted by Dr. Mabee³ and, therefore, it was error for this court to
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5 ²In *Brown v. Secretary of Health & Human Services*, the United
 6 States Court of Appeals for the Sixth Circuit determined the
 7 Plaintiff's IQ score of 68 to be valid and his abilities to be
 8 within the DSM-III-R diagnosis of mild mental retardation
 9 corresponding to an IQ between 50-55 and 70. In that case, the
 10 Plaintiff used public transit, had a driver's license, visited
 11 friends, made change at the grocery store, did his own laundry and
 12 cleaned his room, and worked as a truck driver and used a road
 13 atlas, recorded his mileage, the hours he worked, and the places he
 14 drove. *Brown v. Secretary of Health & Human Services*, 948 F.2d 268,
 15 269-70 (6th Cir. 1991).

16 The *Brown* court explained that individuals with mild mental
 17 retardation can acquire academic skills up to about sixth-grade
 18 level, and during adult years, they can usually achieve social and
 19 vocational skills adequate for minimum self-support, but may need
 20 guidance and assistance when under unusual social or economic
 21 stress. *Id.* "At the present time, virtually all people with Mild
 22 Mental Retardation can live successfully in the community,
 23 independently or in supervised apartments or group homes (unless
 24 there is an associated disorder that makes this impossible)." *Brown*, 948 F.2d at 270 (quoting DSM-III-R § 317.00).

25 ³The Defendant points out that the court did not specify that
 26 the test was administered by Abigail Osborne-Elmer and adopted by
 27 Dr. Mabee. (ECF No. 21 at n.1) The Defendant is correct; however
 28

1 rely upon those scores. (ECF No. 21 at 6.) The Defendant reasoned:
 2 "[t]he ALJ's conclusion was in concert with Dr. Bailey's opinion
 3 that Plaintiff functioned at a higher level than his IQ test scores
 4 would indicate." (ECF No. 21 at 6.)

5 In September 2008, Ms. Osborne-Elmer examined Plaintiff and
 6 administered a variety of psychological tests, and determined
 7 Plaintiff's IQ scores fell "in the extremely low range," with a
 8 verbal score of 64, a performance score of 63 and a full scale score
 9 of 61. (Tr. 185; 191.) On the first part of the Trail Making Test,
 10 on both Parts A and B, Plaintiff's score indicated severe
 11 impairment. (Tr. 191.) On the Rey 15-item test, a screening of
 12 response effort for cognitive testing, Plaintiff's score
 13 "suggest[ed]" he gave "marginal effort." (Tr. 191.) Ms. Osborne-
 14 Elmer opined, "It is likely his impaired performance on [the Rey 15-
 15 item test] is due to poor concentration, slow processing speed and
 16 low cognitive functioning." (Tr. 191.) Ms. Osborne-Elmer diagnosed
 17 Plaintiff with dysthymic disorder and mild mental retardation.⁴
 18 (Tr. 191.)

19 The ALJ recognized Plaintiff's various test results fell into
 20 the severe impairment range and concluded, "given the results of the
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22 this correction does not alter the court's analysis.

23 ⁴Ms. Osborne-Elmer's narrative provided in part:

24 Although he lives independently, he has had some problems
 25 with forgetting to turn the stove off, shopping
 26 independently, and paying his bills on time. Because of
 27 his extremely low Full Scale IQ score and deficits in
 adaptive functioning in the areas of education,
 employment, and social deficits, he currently meets the
 diagnostic criteria for mild mental retardation.

28 (Tr. 192.)

1 Rey-15 item test and the claimant's performance, the undersigned
2 finds these test results are not an accurate reflection of the
3 claimant's abilities." (Tr. 24.) Contrary to the Defendant's
4 suggestion, the ALJ did not expressly reject Plaintiff's IQ scores,
5 but instead focused on Plaintiff's "abilities." The ALJ failed to
6 provide an explanation or cite to substantial evidence to indicate
7 that the IQ test results were invalid. See *Wedge v. Astrue*, 624 F.
8 Supp.2d 1127, 1133 (C.D. Cal. 2008)(ALJ did not provide sufficient
9 reasons for rejecting the validity of a claimant's qualifying IQ
10 score under § 12.05C, where the ALJ did not cite explicit reasons
11 for discrediting the examining psychologist's opinion that the
12 claimant had a performance IQ of 70); see also *Connett*, 340 F.3d at
13 874. As with Defendant's previous argument, the court is unable to
14 accept Defendant's post hoc explanations of what the ALJ may have
15 been thinking. See *Bray*, 554 F.3d at 1225-26.

16 **2. The Second Impairment.**

17 Defendant argues that the Plaintiff did not meet the Listing
18 because he lacked "a physical or other mental impairment imposing an
19 additional and significant work-related limitation of function."
20 (ECF No. 21 at 7.) Defendant asserted, "it is reasonable that the
21 ALJ did not separate out limitations caused by a learning disorder
22 from those caused by his low IQ . . . because the limitations were
23 overlapping." (ECF No. 21 at 8.) In the court's order, the medical
24 evidence on this issue was previously carefully considered by the
25 court, and Defendant's current argument does not provide a basis for
26 amending the judgment. "Whatever may be the purpose of Rule 59(e) it
27 should not be supposed that it is intended to give an unhappy
28 litigant one additional chance to sway the judge." *Frito-Lay of*

1 Puerto Rico, Inc. v. Canas, 92 F.R.D. 384, 390 (D.C. Puerto Rico
2 1981). As the court decided in the Order, under *Fanning v. Bowen*,
3 827 F.2d 631, 633 (9th Cir. 1987) and the revised regulations for
4 Listing 12.05C, the ALJ's step two finding that Plaintiff's mild
5 mental retardation and learning disorder are severe impairments,
6 satisfies the second prong of Listing 12.05C. (Opinion, at 9-10.)

B. Conclusion and Order

8 The Plaintiff met the Listing for 12.05C and remanding for
9 payment of benefits was not error. The Defendant's Motion to Alter
10 or Amend the Judgment in this action (**ECF No. 20**) is **DENIED**.

11 || DATED June 26, 2012.

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S/ CYNTHIA IMBROGNO
UNITED STATES MAGISTRATE JUDGE

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